SUPREME COURT, U. S.

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No. 428

Supreme Court of the United States

OCTOBER TERM, 1967

MIDWEST TELEVISION, INC., SAN DIEGO TELECASTERS, INC., and JACK O. GROSS, *Petitioners,*

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO., and TRANS-VIDEO CORP., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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This brief is submitted in response to the briefs in opposition to the grant of a writ of certiorari filed by Southwestern Cable Co. (Southwestern) and collectively by Mission Cable TV, Inc., Pacific Video Cable Co., and Trans-Video Corp. (Mission).[1]

[1] References to the two briefs in opposition are designated "Southwestern" and "Mission" respectively. References to the appendices to the petition of the United States in No. 363, Oct. Term, 1967, seeking review of the same decision, are designated "U.S. App."

I

Both opposition briefs contend that the court below did not decide that the Federal Communications Commission lacks jurisdiction over CATV but held only that procedural requisites for a temporary stay of CATV expansion had not been satisfied (Southwestern, p. 11; Mission, p. 5). This attempt to construe the decision below narrowly, in order to avoid the conflict between it and the decision of the District of Columbia Circuit in *Buckeye Cablevision, Inc. v. FCC*, No. 20274 (June 30, 1967), fails on every score.

As evidence that the Ninth Circuit did not reach the jurisdictional issue, Southwestern notes that the court defined the question to be the validity of the grant of temporary relief, declined to express its views on unspecified "other issues raised in this proceeding" and set aside the temporary stay without vacating the Commission's order that a hearing be held (Southwestern, p. 11). Not one of these actions is inconsistent with the court's adoption of the position, as the ground for setting aside the temporary order, that the Commission lacks authority over CATV.

The only relief granted by the Commission against respondents was a temporary stay limiting expansion of their systems. The Commission's mere designation of the case for hearing on the issue of a permanent order (an action not challenged by respondents below as working severe and irremediable injury upon them) could not have been set aside by the Ninth Circuit consistent with the longstanding requirement of exhaustion of administrative remedies. *E.g., Petroleum Exploration, Inc. v. Public Serv. Comm'n*, 304 U.S. 209 (1938); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938). In any event, the Ninth Circuit's opening description of the review petitions before it as seeking to "set aside *portions* of" the Commission's order establishes its belief that only the temporary stay was under attack by respondents at that

stage (U.S. App. A, p. 21) (emphasis added).[2] The court's reference to questions before it but left undecided must be taken as referring to respondents' further attacks on the Commission's temporary stay, including claimed violations of the First Amendment and the Administrative Procedure Act (Mission, p. 3, n.2).

The best proof of the legal conclusions of the Ninth Circuit is its own opinion. While respondents emphasize a concluding paragraph of the opinion suggesting that procedural infirmities undercut the temporary stay, they entirely ignore the preceding ten paragraphs, the heart of the decision, which dwell upon *Regents v. Carroll,* 338 U.S. 586 (1950), and other authorities and arguments presented to the court to support the proposition that Commission power is limited to station licensees. This lengthy discussion is wholly unnecessary save as it develops the court's basic determination that the temporary stay is invalid because the Commission's powers do not extend beyond station licensees to CATV systems.

The breadth of the Ninth Circuit rationale and the conflict with *Buckeye* are fully borne out by subsequent interpretations of the opinion. Respondent Southwestern finds a contrary inference in the fact that *Buckeye* did not mention the Ninth Circuit decision below as an inconsistent precedent. Although there are numerous possible reasons for its not doing so, speculation is hardly a basis for action by this Court. In any event, the District of Columbia Circuit's recent order in *Valley Vision, Inc. v. FCC,* No. 21063 (Sept. 6, 1967) (reprinted as Appendix A to this brief), shows that it regards the Ninth Circuit decision as being squarely in conflict with *Buckeye.*[3]

[2] If the Ninth Circuit thought it had before it the Commission's decision to order a hearing, the court could scarcely have avoided saying something about the question, however it dealt with the Commission's grant of interim relief.

[3] *Valley Vision* first cites *Buckeye* to support Commission power over CATV and then follows it with the Ninth Circuit decision as a "contra" citation.

The Ninth Circuit also, as we pointed out in our petition for certiorari (p. 7), has plainly shown by *its* interim order of June 29, 1967, in *Valley Vision, Inc. v. United States*, Nos. 21869-70, that it regards its decision below as settling the broad jurisdictional issue. That order cited the present decision as sole authority for staying a final and permanent Commission cease-and-desist order issued after a hearing against violation of the CATV rules; no temporary Commission stay was involved. Southwestern would explain away the *Valley Vision* order by observing that "the issuance by a court of a temporary stay pending decision involves a complex of legal and equitable considerations" (p. 11, n.9). Far from disposing of the *Valley Vision* order, this truism supports the view that the order's sole reliance on the present case means the Ninth Circuit regarded the jurisdictional issue as so plainly settled by its earlier decision as to warrant a stay without further discussion of law or equities.[4]

Finally, we agree with respondents that the narrower question of Commission authority to issue temporary orders is also involved in the present case. Indeed, our certiorari petition argued that the practical impact and legal implications of denying the Commission power to grant interim relief would itself justify the grant of certiorari (pp. 7, 14). But there can be no doubt that the Ninth

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[4] Respondents claim that, when the Commission denied their petition to terminate the hearing, it construed the Ninth Circuit opinion as not passing on the jurisdictional issue (Southwestern, p. 12; Mission, p. 11). The United States and the Commission anticipated and fully answered this point (petition for certiorari, p. 15, n.12). Petitioner Midwest did take the view quoted at length in Mission's brief (p. 12, n.6). However, the Commission did not accept it as the very language of the Commission quoted by Mission (p. 11) makes clear. Moreover, as Mission concedes (*id.*), respondents' position here is wholly inconsistent with their position at the Commission. For they petitioned to dismiss the *entire* Commission proceeding on the ground that the Ninth Circuit decision meant that the Commission had no authority to issue a permanent order.

Circuit's principal rationale is that the Commission lacks authority over CATV, and respondents have not denied that such a question warrants certiorari.

II

One of respondents, Southwestern, has suggested that certiorari be denied because the eventual entry of a permanent order in favor of either side will supersede the temporary stay now outstanding, so that either the case might be rendered moot before decision by this Court or such a decision "will be operative only for a limited period of time" (p. 15). The first of the alternative possibilities, mootness, is unrealistic on the present facts, while the second possibility is not an argument against certiorari.

Even assuming that the advent of a permanent order would technically moot the pending case,[5] there is no practical likelihood that such an order will be entered before the conclusion of this Court's present Term. Reply briefs and findings were submitted to the Commission's hearing examiner on September 8, 1967. In reaching an initial decision, he will have to consider lengthy arguments based on a large record developed during 28 days of hearing and numerous hearing conferences over a period of eight months. Even assuming that the usual lengthy intermediate Review Board procedures are by-passed, 47 C.F.R. § 0.365(a) (1967), exceptions to the initial decision will then be reviewed by the full Commission, 47 C.F.R. § 1.276 (1967), whose practice is to allow full briefing and oral argument. After the Commission's decision, a petition for reconsideration may be filed and the Commission can suspend its decision while it considers the petition. 47 C.F.R. § 1.06 (1967). Given the Commission's heavy workload it will be fortunate if a final decision is reached by next summer so the chance the case may be rendered moot is all but nonexistent.

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[5] *But see* Newport News Co. v. Schauffler, 303 U.S. 54, 58 (1938); Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 514-16 (1911).

Moreover, the Commission's power to grant temporary stays without a plenary hearing is intrinsic to the sound operation of its regulatory scheme, and the issue is one independently deserving of certiorari. Yet because it will always be presented by the grant or denial of interim relief, the possibility of mootness can never be escaped if the Court is ever to pass upon the question.

While the mootness argument is chimerical, it is quite true that the Court's decision might be "operative" in the present case for only a limited time, perhaps only a few months, but Southwestern fails to explain why this furnishes the slightest reason for denying certiorari. The sustaining of the temporary order is vital to petitioners no matter how quickly a permanent order may emerge, because the speed with which customers can be wired into an ongoing CATV system and the difficulty in retrenching could make the permanent order an illusory victory were the temporary stay to lapse for any interval at all.

As the Commission stated in issuing the temporary order in this case:

> "[U]nless this expansion is appropriately limited pending resolution of the issues, within a very short period of time the systems could wire up thousands of new subscribers. We have made clear in the Second Report the impracticability of withdrawing service, once established, because of its disruptive effect. We have also made clear the strong public interest considerations which should be resolved before the establishment or entrenchment of CATV substantially throughout an area such as San Diego is permitted." 4 F.C.C.2d at 621 (U.S. App. C, p. 50).

If certiorari is denied, it would be no "short period" but an interval of half a year or more during which the CATV systems could expand their reach and undermine existing local television.

Finally, both petitioners and all other litigators in this field have an evident and important long-term interest in the case. A decision by this Court on the Commission's

jurisdiction over CATV will be equally vital to petitioners when and if the present temporary stay is converted into a permanent order of continuing duration. Although the still broader issue of Commission authority over CATV could be reached in other cases involving permanent orders, the very abundance of such cases, present and potential, is all the more reason why this case should be taken to resolve the intercircuit conflict at the earliest opportunity.

III

Since respondents proceed from the incorrect premise that the Ninth Circuit skirted the basic question of Commission authority over CATV, petitioners' claim of error on the broad issue and the importance of that issue stands unchallenged. Moreover, the conflict with *Buckeye* would in any event raise sufficient doubts to warrant resolution by this Court.

Respondents do argue that the Commission lacks power to issue interim stays without a plenary hearing, a point dealt with but briefly in the Ninth Circuit opinion. While our own certiorari petition and that of the United States and the Commission amply demonstrate that the Commission afforded procedural protections both generous and adequate under the law, it may be helpful to answer briefly the principal claims made by respondents.

In support of its position, Southwestern points to a statement by Professor Jaffe that agency power to issue interim orders must derive from statute and to the decisions in *Trans-Pacific Freight Conf. of Japan v. FMB*, 302 F.2d 875 (D.C. Cir. 1962), and *Standard Airlines, Inc. v. CAB*, 177 F.2d 18 (D.C. Cir. 1949) (Southwestern, pp. 16-19). But Professor Jaffe's dictum does not answer the question whether such a power in fact has been granted the Commission, a grant whose exercise in this instance is sustained by analogous de-

cisions discussed in our certiorari petition (p. 10).[6] As to the cases noted by Southwestern, neither of which was cited by the Ninth Circuit, the short answer is that both are distinguishable: *Trans-Pacific* because the Maritime Board lacks the statutory grant of authority possessed by the Commission and because the interim stay was premised on the equities between the parties with no finding that the public interest required it; and *Standard Airlines* because, *inter alia*, the order of the CAB deprived the subject of its CAB-licensed ongoing business instead of merely setting a partial limit on its expansion.

The other principal ground for Southwestern's position on the merits is the Communications Act requirement that full hearings precede cease-and-desist orders under Section 312(b) and modification of licenses under Section 316 (p. 18). 47 U.S.C. §§ 312(b), 316 (1964). The orders contemplated in both cases are final orders permanently affecting the rights of the parties subject to them. It is hardly inconsistent with these sections, and is indeed wholly consonant with judicial procedure for issuance of injunctions, to allow interim orders

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[6] One of these cases, R. A. Holman Co. v. SEC, 299 F.2d 127 (D.C. Cir.), *cert. denied*, 370 U.S. 911 (1962), is distinguished by Southwestern (p. 22, n.17) on the ground that the power there exercised was "generally recognized," whatever that adds, and had been "contemplated" by Congress, which is an inaccurate inference from the legislative history. Mission (p. 15) seeks to distinguish *Holman* on the ground that the court assumed rather than passed upon the question, although the court's brief treatment more readily suggests it deemed the question simple. Both respondents distinguish Amerada Petroleum Corp. v. FPC, 293 F.2d 572 (10th Cir. 1961), *cert. denied*, 368 U.S. 976 (1962), on the ground that the FPC was exercising an expressly granted power (Southwestern, p. 22, n.17; Mission, pp. 14-15), ignoring the fact that the FPC's action effectively avoided the five-month time limit specified in the statutory grant.

to preserve the status quo upon less exacting formalities than are required for permanent orders – although the formalities in this instance were ample, respondents having both notice and opportunity to submit written pleadings and evidence.

In addition, requiring a plenary hearing before staying the expansion of CATV systems would produce a limitation both incongruous and easily circumvented. Assuming authority over CATV, the Commission could ban all CATV outright subject to exceptions granted after hearings on the public interest, which is just what it has done for some classes of CATV activity. 47 C.F.R. § 74.1107(a) (1957). The Commission's generous decision not to invoke such a ban in all cases but to grant temporary stays only where necessary and upon written evidence and pleadings can hardly *add* procedural requirements in such cases.

Finally, a brief response is called for by Mission's dual intimation that the Commission's failure to seek a temporary stay in court under *FTC v. Dean Foods Co.*, 384 U.S. 597 (1966), was to avoid the burden of establishing the public interest, and that the availability of the *Dean Foods* route dilutes the importance of the question of Commission power to issue temporary stays (Mission, pp. 7-9). With respect to the burden of proof, the Ninth Circuit nowhere suggested any doubt about the Commission finding, though such a narrow ground would presumably have been chosen were it available; and had an injunction been sought, the Commission's views on the public interest would have carried the greatest weight in any event. Nor is the availability of a court-granted stay a substitute for Commission action. Quite apart from the Commission's responsibility to act itself in matters within its primary jurisdiction, requiring it

to commence suits in court every time a temporary stay is warranted would be an unnecessary and heavy burden both upon the courts and the Commission.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September, 1967

Appendix A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,063

VALLEY VISION, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

On Appellant's Motion to Dismiss

Decided September 6, 1967

Messrs. Lauren A. Colby and *Gennaro Caliendo* were on appellant's motion to dismiss.

Messrs. Henry Geller, General Counsel, Federal Communications Commission, *John H. Conlin,* Associate General Counsel, and *Robert D. Hadl,* Counsel, Federal Communications Commission, were on appellee's answer to the motion to dismiss. *Mrs. Leonore G. Ehrig,* Counsel, Federal Communications Commission, also entered an appearance for appellee.

Before WILBUR K. MILLER, *Senior Circuit Judge,* and WRIGHT, and LEVENTHAL, *Circuit Judges.*

PER CURIAM: The Federal Communications Commission ordered appellant to cease and desist from the continued carriage of "distant signals" on its CATV system in Placerville, California. Prior to noting an appeal in this Court under § 402(b) of the Communications Act,[1] appellant

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[1] 48 Stat. 926 (1934), as amended, 47 U.S.C. § 402(a) (1964).

instituted an appeal in the Court of Appeals for the Ninth Circuit under § 402(a) challenging the same decision of the Commission. The Ninth Circuit has issued an interlocutory injunction staying the effectiveness of the Commission's order. Appellant now requests that we dismiss his appeal so that he may prosecute the entire matter in the Ninth Circuit.

We do not dismiss but yield *sua sponte* to the Congressional intent that an administrative action be reviewed only by the Court of Appeals in which proceedings were first instituted. 28 U.S.C. § 2112(a).[2] We do so despite our belief that the District of Columbia Circuit has exclusive jurisdiction to review the challenged order. The Federal Communications Commission has the power to issue cease and desist orders pursuant to § 312 of the Communications Act to enjoin violations of the CATV regulatory scheme. See *Buckeye Cablevision, Inc.* v. *Federal Communications Commission*, __ U.S. App. D.C. __, __ F.2d __ (No. 20,274, decided June 30, 1967); *contra, Southwestern Cable Co.* v. *United States*, __ F.2d __ (No. 21,183, 9th Cir., decided April 28, 1967). Under § 402(b)(7) the Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction to review Federal Communications Commission cease and desist orders.[3]

To avoid any possibility of misunderstanding, our action today transferring the appeal to the Court of Appeals for the Ninth Circuit is in deference to § 2112(a) and the need for avoiding unseemly conflict, and does not signal that we

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[2] See *Eastern Air Lines, Inc.* v. *CAB*, 122 U.S. App. D.C. 375, 354 F.2d 507 (1965); *Ball* v. *NLRB*, 299 F.2d 683 (4th Cir.), *cert. denied*, 369 U.S. 838 (1962).

[3] See, *e.g.*, *Tomah-Mauston Broadcasting Co.* v. *FCC*, 113 U.S. App. D.C. 204, 306 F.2d 811 (1962); *Functional Music, Inc.* v. *FCC*, 107 U.S. App. D.C. 34, 274 F.2d 543 (1958), *cert. denied*, 361 U.S. 813 (1959). *Cf. Helena TV, Inc.* v. *FCC*, 269 F.2d 30 (9th Cir. 1959).

are receding from our view that the case properly belongs in the District of Columbia Circuit.

It is so Ordered.

Senior Circuit Judge Miller did not participate in the foregoing opinion.